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| 10/731,980   | 12/10/2003  | David A. Holcomb     | 200017.437                    | 6457             |
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| SEED INTELLECTUAL PROPERTY LAW GROUP PLLC<br>701 FIFTH AVE<br>SUITE 6300<br>SEATTLE, WA 98104-7092 |             |                      |                               |                  |
|  |             |                      | EXAMINER<br>COOLEY, CHARLES E |                  |
|  |             |                      | ART UNIT<br>1723              | PAPER NUMBER     |

DATE MAILED: 05/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/731,980

**Applicant(s)**

HOLCOMB ET AL.

**Examiner**

Charles E. Cooley

**Art Unit**

1723

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 13 March 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1-14 is/are allowed.
- 6) ☒ Claim(s) 15-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 13 March 2006 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **FINAL OFFICE ACTION**

### ***Drawings***

1. The drawings were received on 13 MAR 2006. These drawings are approved.

### ***Specification***

2. The abstract is acceptable.
3. The amended title of the invention is acceptable.

### ***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

5. **Claims 15, 18, and 24 are rejected under 35 U.S.C. 102(e) as being anticipated by Schub (US 6,764,704).**

The patent to Schub discloses in Fig. 4 a whisk head 34; a handle 22; a resilient coupling 122 between the whisk head 34 and the handle 22; the whisk head 34 retained by the coupling 122 and capable of permanent connection thereto as set forth below.

More particularly, the patent to Schub discloses another embodiment of the present invention in Figure 4 that is directed to a whipping apparatus having a motor for creating rotational motion, an arm in communication with the motor for transferring the rotational motion, a rod having a first end and a second end, and a whipping head. The whipping head is in communication with the first end of the rod. A stabilizing member or element, typically a spring or other flexible member, including elastomeric tubes or the like, is configured for receiving the arm and the second end of said rod, typically in a frictional engagement, and by connecting the rod and arm, allows for the transfer of rotational motion from the arm to the whipping head, via the rod. The flexibility of the stabilizing member allows for self-righting of the whipping head by the gyroscopic effect with the angular momentum created upon operation of the apparatus.

FIG. 4 details another embodiment of the apparatus 120 of the present invention. In this apparatus 120, the rod 28 connects to the arm 29 by frictionally fitting within a spring 122 or other flexible member, such as a elastomeric tube or the like. The spring 122 or other flexible member provides lateral stability to the rod 28 and the whipping head 34, when in rotation.

The spring 122 or other flexible member is preferably of two portions 122a, 122b, each portion of different internal diameters, with a smaller internal diameter portion 122a for receiving and retaining the rod 28 and a larger internal diameter portion 122b for receiving and retaining the arm 29, preferably in at least a substantially coaxial alignment. Alternately, the spring 122 or flexible member can also be of a single internal diameter. Internal diameters of the portions 122a, 122b, of the spring 122 are preferably

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less than, but could also be the same as the diameters of the diameters of rod 28 and arm 29, respectively. Alternately, if the spring 122 or flexible member is of a single internal diameter, this diameter should preferably be less than, but could also be equal to, the diameter that is smallest of the rod 28 or arm 29. It is preferred that the spring diameter(s) be less than the diameters of the rod 28 and arm 29, such that there be a strong frictional engagement between the inner surface of the spring portions 122a, 122b, or the spring 122 (in the case of a single internal diameter) and the outer surfaces of the rod 28 and arm 29, when a sufficient portions of the rod 28 and arm 29 are engaged in the respective portions 122a, 122b of the spring 122, or the spring 122 itself (in the case of a single internal diameter).

The rod 28 and arm 29 extend into their respective portions 122a, 122b in the spring 122 a distance so as to provide stability in a whipping operation. Extension into the spring 122 is such that the rod 28 and arm 29 are spaced apart within the spring 122 to provide lateral flexibility for the whipping operation. However, the spacing can be minimal and even to a point where the rod 28 and arm 29 abut within the spring 122.

The rod 28, arm 29 and spring 122 are preferably cylindrical in shape, and circular in diameter, outer diameter, for the rod 28 and arm 29, and inner diameter, for the spring 122. Other shapes and diameters are also permissible, provided that these members are properly retained by the spring 122 or other flexible member, to provide the rod 28 and whipping head 34 with sufficient lateral stability.

The spring 122 is typically a tubular coil spring, and of similar construction and materials like the spring 36 detailed above. The above detailed friction fit can be

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enhanced by adhesives (for metals, polymers, elastomers, etc., depending on the material of the spring 122 or flexible member), or other fasteners or welds. Moreover, the spring 122 or other flexible member is of a flexibility such that when in rotation, sufficient rotational energy will be transferred to the rod 28 and ultimately the whipping head 34. This transferred rotational energy, coupled with the whipping head 34 centralizing itself based on centrifugal forces (and thus minimizing energy loss from lateral forces), will result in the whipping head maximizing rotation speed and creating forces necessary for proper whipping, even when the rod 28 and arm 29 are not coaxial with respect to each other, or when the rod 28 is bent, or should the whipping head 34 becomes unbalanced, or combinations thereof. Still further, the spring 122 absorbs shock, so as to prevent bending of the rod 28. (emphasis by the examiner)

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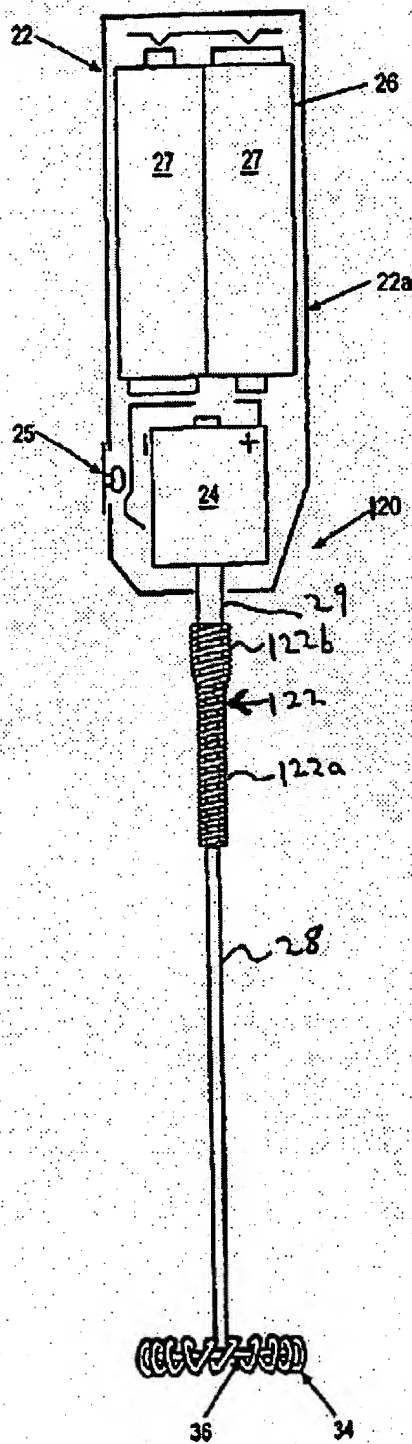


Fig. 4

**6. Claims 15, 16, 18, and 24 are rejected under 35 U.S.C. 102(b) as being anticipated by Mattar (US 5,676,464).**

The patent to Mattar discloses in Figs. 1-2 4 a whisk head 28; a handle 22; a resilient coupling 26 or 30 between the whisk head 28 and the handle 22; the whisk head 28 retained by the coupling 26 or 30 and capable of permanent connection thereto; and a cable 32 between the handle 22 and the coupling 26 or 30.

More particularly, the patent to Mattar discloses that any of a wide variety of implements may be used with the drive unit and support means. In a particularly preferred embodiment, a flexible connector such as a short length of rubber tubing, is included between the drive unit and the implement, such as a whisk. This flexible connector causes the implement to both revolve and to rotate in a circle. For optimum stirring the length of the flexible connector is adjusted so that the circle takes the stirring implement along a path adjacent to the corners of the pot. Typical implements include whisks, paddles, rod mounted wires, coring devices etc.

FIG. 1 illustrates a typical implement in use; here, a whisk 28 of generally conventional construction is seen within the cut away portion of pan 10. Whisk 28 in this embodiment has a flexible connection 30 to drive connection 26. As detailed below, there are several different arrangements for provide flexible connection 30. With flexible connection 30, whisk 28 will both revolve around the whisk centerline but will also rotate about a circle so that the entire bottom of the pan, including edge area, will be stirred. If desired, an implement such as whisk 30 can be mounted on drive connection 26 without



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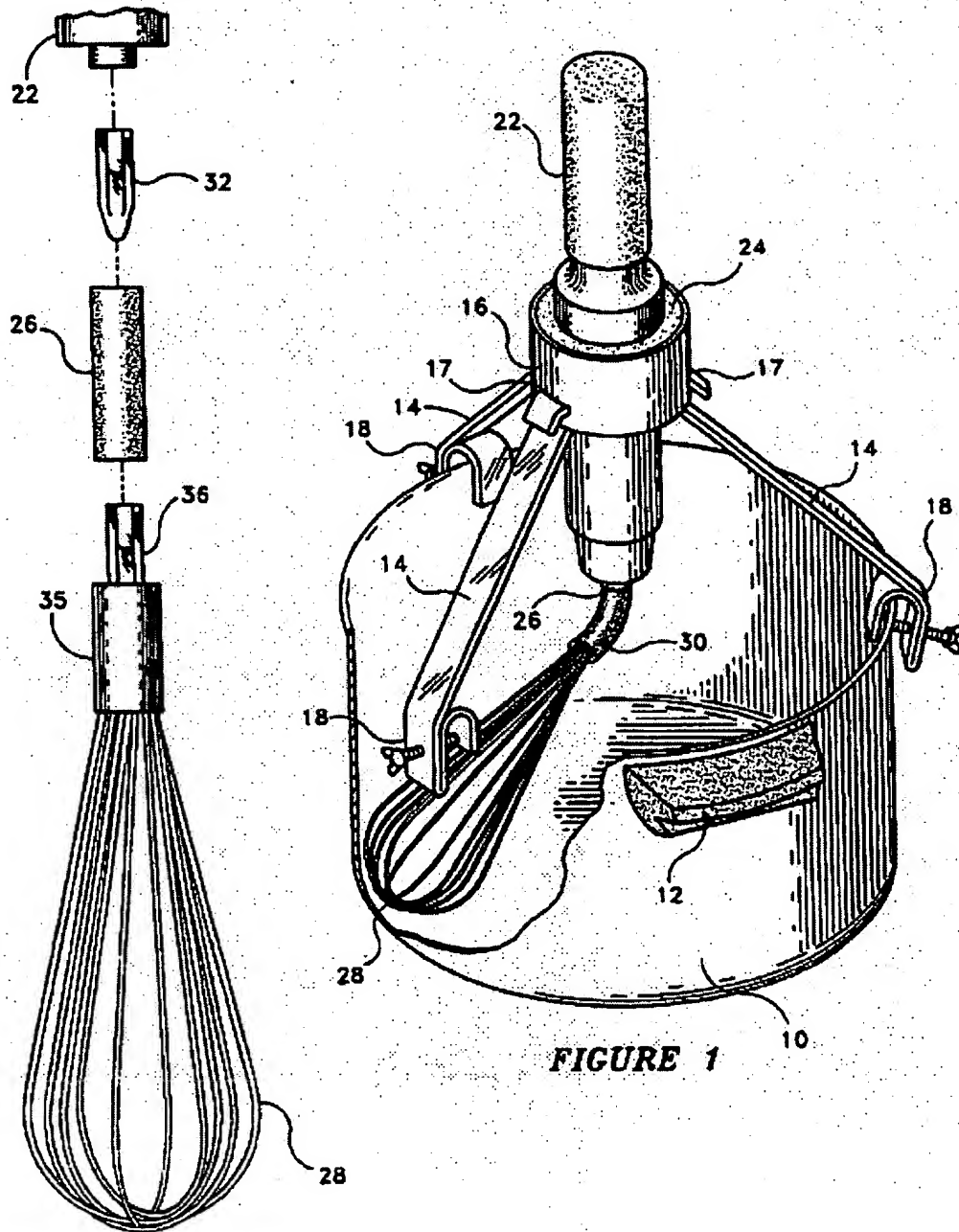
flexible connection 30, so that the whisk will rotate only at the center of pan, which may be acceptable for some purposes, such as stirring a clear broth.

FIG. 2 illustrates, in an axially exploded view, a first embodiment of a flexible mounting arrangement for a stirring implement. Drive unit 22 has a short pin 32, round or hexagonal as desired, fitted in the drive unit collet or other holding means. A flexible connection 26, typically a short (generally about 0.5 to 2 in. in length) rubber or similar material tube, sized to fit tightly over pin 32 is pushed over pin 32. The implement to be used, here a whisk 28, has a base 35 with an axially extending pin 36. When drive unit 22 is operated with whisk 28 in place, the unit will rotate the whisk and centrifugal force combined with the flexibility of connecting tube 26 will cause the distal end of the whisk to revolve along a circular path. The diameter of the circular path is governed by the vertical position of drive unit 22 within the collar and is affected by the speed of the drive unit and the distance between the ends of pins 32 and 36 within tube 26, so that the diameter can be easily adjusted by modifying drive motor position or the like.

This whisk assembly can be formed in any suitable manner. Typically, the handle end of a conventional whisk can be inserted in one end of a short metal tube 35, pin 36 can be inserted in the opposite end and the tube filled with a potting compound, such as an epoxy or polyester resin to hold the assembly together. Often commercial whisks have hollow handle portions that can serve as the tube 35 for receiving pin 36. Pin can have any suitable cross section, e.g. round or hexagonal. A hexagonal pin sized to fit in the drive unit drive connection is preferred, so that whisk 28 could be directly connected to the drive unit if desired.

FIGS. 7 and 8 show two embodiments of an implement in the form of an auger for coring and hollowing elongated vegetables. As seen in FIG. 7, auger 70 includes a primal end 72 configured (e.g. cylindrical or hexagonal) to fit in the chuck or collet of drive unit 22. Auger 70 includes a coring and hollowing segment 74 at the distal end including a drill portion 76 for drilling a hole into the vegetable 77 (such as a zucchini, cucumber or the like), a side cutting portion in the form of a spiral sharpened rib 78 and a rounded central member 80 extending distally beyond drill 76.

In use, an elongated vegetable is typically cut in half crosswise and held in one hand and the drive unit in the other. The distal end of auger 70 is pressed against the center of the cut end, pushing rounded end 80 into the meat and drilling a central hole until the rounded end reaches the end rind. Once drilling is complete, when the user feels that the end rind has been reached, the users moves the auger around in a generally circular path to remove the desired amount of meat, out to the side rind if desired. The meat that has been extracted is shredded and can be used in cooking. (emphasis by the examiner)



**FIGURE 2**

**7. Claims 15, 18, 19, and 24 are rejected under 35 U.S.C. 102(b) as being anticipated by Maslow (US 2,208,337).**

The patent to Maslow discloses in the Figures a whisk head 1; a handle 2; a resilient coupling 3 between the whisk head 1 and the handle 2; the whisk head 1 retained by the coupling 3 and capable of permanent connection thereto; and a core 5.

More particularly, the patent to Maslow discloses in Figure 1, element 1 indicates a plurality of loops that are preferably formed of strong resilient wire and are maintained spaced apart so as to give a good whipping action when the device is in use. The respective ends of each of the loops are anchored in a handle 2. This handle may be disengaged from the loops and yet the loops held in their assembled position by a retaining spring 3, which is slightly resilient and which is provided with an opening 4 sufficiently large to allow the end portion of any one of the loops to pass, as indicated in Fig. 3. (emphasis by the examiner)

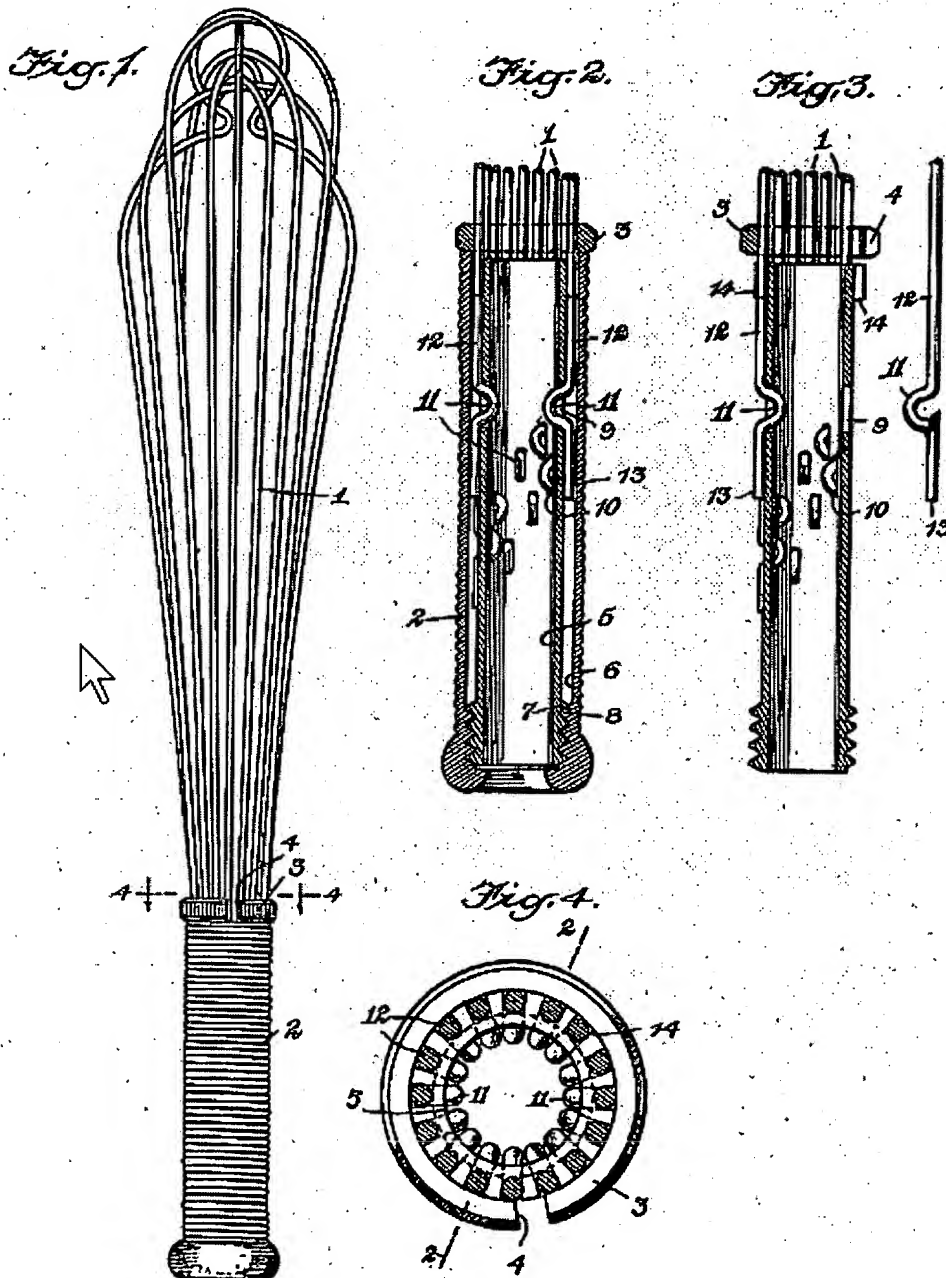
July 16, 1940.

L. MASLOW

2,208,337

WHIP

Filed March 28, 1940



***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

**10. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Mattar (US 5,676,464) in view of Kesilman et al. (US 3,412,983).**

Mattar does not disclose the cable being formed of stainless steel. Kesilman et al. (US 3,412,983) discloses a whisk and teaches that elements of the whisk can be formed of stainless steel. It would have been obvious to one having ordinary skill in the art, at the time applicant's invention was made, to have formed any of the elements of the whisk of Mattar from stainless steel, including the cable, as suggested by Kesilman

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et al. (US 3,412,983) for the purpose of imparting rust resistance to whisk and its ability to sustain contact with hot water for cleaning purposes without damage (col. 4, lines 16-20).

Furthermore, it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416. Additionally, in view of the fact that the use of stainless steel vis-à-vis any other common construction material solves no stated problem insofar as the record is concerned and the conclusion of obviousness can be made from the common knowledge and common sense of one of ordinary skill in the art (*In re Bozek*, 416 F.2d 1385, 163 USPQ 545 (CCPA 1969)), it would have been obvious to one of ordinary skill in the art to have formed any of the components of the prior art whisk from a well-known construction material such as stainless steel. *In re Kuhle*, 526 F.2d 553, 188 USPQ 7 (CCPA 1975).

It is observed that artisans must be presumed to know something about the art apart from what the references disclose (see *In re Jacoby*, 309 F.2d 513, 135 USPQ 317 (CCPA 1962)). Moreover, skill is presumed on the part of those practicing in the art. See *In re Sovish*, 769 F.2d 738, 226 USPQ 771 (Fed. Cir. 1985). Therefore, it is concluded that the selection of a well-known material in the art such as stainless steel would have been obvious to one of ordinary skill in this art, if for no other reason than to achieve the advantage of using a more modern material or a lower cost or more easily fabricated material or to employ a material with particular desired properties such as resistance to corrosion and durability.

**11. Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over Maslow (US 2,208,337) in view of FR 2458262.**

Maslow does not disclose the recited core. FR 2458262 discloses a whisk having a handle G; a coupling C, GF, K; and a whisk head A. A core R is embedded in the handle G to reinforce the attachment of the handle to the coupling. The core is formed of a molded plastic material that fills the inner region of the handle and around the ends of the whisk wires (per the abstract and see the Figure). It would have been obvious to one having ordinary skill in the art, at the time applicant's invention was made, to have provided the handle of Maslow with a core formed of plastic material as disclosed by FR 2458262 for the purposes of securing the ends of the whisk wires in the handle and to seal the handle against fluids to prevent contamination of the whisk.

**12. Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Schub (US 6,764,704), Mattar (US 5,676,464), or Maslow (US 2,208,337) in view of Butte (US 5,688,045).**

Schub (US 6,764,704), Mattar (US 5,676,464), or Maslow (US 2,208,337) do not disclose the recited handle material. Butte discloses a whisk having a handle 1 formed with an over-molded plastic material 6. It would have been obvious to one having ordinary skill in the art, at the time applicant's invention was made, to have provided the handles of Schub (US 6,764,704), Mattar (US 5,676,464), or Maslow (US 2,208,337) with an over-molded plastic material as disclosed by Butte for the purposes of providing



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an impermeable seal against liquids and to facilitate cleaning of the whisk (col. 2, lines 52-55; col. 3, lines 22-28 and lines 60-67; col. 4, lines 12-21).

**13. Claims 22-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schub (US 6,764,704), Mattar (US 5,676,464), or Maslow (US 2,208,337) in view of Bendickson et al. (US 4,825,552).**

Schub (US 6,764,704), Mattar (US 5,676,464), or Maslow (US 2,208,337) do not disclose the recited durometer range of the handle. Bendickson et al. discloses a culinary hand-held implement having a working end 11 and a handle 12. The handle is formed from an elastomeric material having a durometer range of 50 to 60. It would have been obvious to one having ordinary skill in the art, at the time applicant's invention was made, to have provided the handles of Schub (US 6,764,704), Mattar (US 5,676,464), or Maslow (US 2,208,337) such that they fall within the recited range for the purposes of providing the proper degree of flexibility to the handle without losing flexibility and a comfortable feel or rendering the implement difficult to control (col. 3, line 64 - col. 4, line 7).

***Allowable Subject Matter***

14. Claims 1-14 are allowable.

15. The following is an Examiner's statement of reasons for the indication of allowable subject matter:

Claims 1-6 are allowed for the reasons advanced by Applicant in the response filed 13 MAR 2006. Claims 7-14 are allowed since allowed claim 7 was placed into independent form.

***Response to Amendment***

16. Applicant's arguments filed 13 MAR 2006 have been fully considered but they are not deemed to be persuasive.

Applicant is reminded that "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). The elements must be arranged as required by the claim, but this is not an ipsissimis verbis test, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990).

Turning to the rejection of the claims under 35 U.S.C. § 102(b), it is noted that the terminology in a pending application's claims is to be given its broadest reasonable interpretation (*In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989)) and limitations from a pending application's specification will not be read into the claims (*Sjolund v. Musland*, 847 F.2d 1573, 1581-82, 6 USPQ2d 2020, 2027 (Fed. Cir. 1988)). Anticipation under 35 U.S.C. § 102(b) is established only when a single prior art

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reference discloses, either expressly or under the principles of inherency, each and every element of a claimed invention. See *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1570, 7 USPQ2d 1057, 1064 (Fed. Cir.), cert. denied, 488 U.S. 892 (1988); *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). Moreover, anticipation by a prior art reference does not require either the inventive concept of the claimed subject matter or the recognition of properties that are inherently possessed by the prior art reference. *Verdegaal Brothers Inc. v. Union Oil co. of California*, 814 F.2d 628, 633, 2 USPQ2d 1051, 1054 (Fed. Cir. 1987), cert. denied, 484 U.S. 827 (1987). A prior art reference anticipates the subject matter of a claim when that reference discloses each and every element set forth in the claim (*In re Paulsen*, 30 F.3d 1475, 1478-79, 31 USPQ2d 1671, 1673 (Fed. Cir. 1994) and *In re Spada*, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990)); however, the law of anticipation does not require that the reference teach what Applicant is claiming, but only that the claims "read on" something disclosed in the reference. *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984) (and overruled in part on another issue), *SRI Intel v. Matsushita Elec. Corp. Of Am.*, 775 F.2d 1107, 1118, 227 USPQ 577, 583 (Fed. Cir. 1985). Also, a reference anticipates a claim if it discloses the claimed invention such that a skilled artisan could take its teachings in combination with his own knowledge of the particular art and be in possession of the invention. See *In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995), cert. denied, 116

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S.Ct. 1362 (1996), quoting from *In re LeGrice*, 301 F.2d 929, 936, 133 USPQ 365, 372 (CCPA 1962).

With regard to Schub, the element 34 can be deemed equivalent to the broadly recited “whisk-head” lacking any defining structure to the contrary. The examiner asserts that a “whisk-head” can indeed take many geometrical forms (such as the classic teardrop shape, a spirally shaped coil, linear members, etc.). To support this assertion, see the cited patents to Khan et al., Delbor, Cheung, and Lane that each show spiral or helically coiled whisk head elements similar to that of Schub and which are referred to as whisks. Note the cited patents to Schmitt and Borner are described as whisks yet show linear type whisk heads. The patent to Bayly shows a device having a head portion that is neither teardrop shape, a spirally shaped coil, or formed of linear members yet is still described as a whisk. Thus, Applicant’s suggestion that a “whisk-head” connotes some specific shape or geometry to preclude a rejection over Schub (or any other prior whisk for that matter) is a premature conclusion.

The whisk devices of Schub, Mattar, and Maslow are each hand manipulated by a user. The fact that Schub and Mattar are motor driven does not defeat the rejections of the claims since the manner in which the devices are used is not afforded any patentable weight because it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647; *In re Sebald*, 122 USPQ 527; *In re Lemin et al.*, 140 USPQ 273; *In re Sinex*, 135 USPQ 302; *In re Pearson*, 181 USPQ 641.

Applicant argues the handle of Schub "is not adapted for manual manipulation" (whatever that means). Assuming this is a true statement, how is the device of Schub (and Mattar for that matter) used if not by manual manipulation? Applicant further contends that a "handle that is sized to house a motor and a power source is not adapted for manual manipulation." Applicant's position on this point is considered to be speculative attorney's argument unsupported by objective technical evidence on the issue. Arguments of counsel cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965); *In re Pearson*, 494 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974). The fact that one skilled in the art might realize from reading a disclosure that something is possible is not a sufficient indication to such person that the something is a part of the appellants' disclosure. See *In re Barker*, 559 F.2d 588, 591, 194 USPQ 470, 472 (CCPA 1977), cert. denied, 434 U.S. 1064 (1978). Note with regard to Mattar, the patent actually teaches manual manipulation of the handle/motor housing 22 (see the underlined language in the last paragraph of the rejection).

With regard to the couplings of Schub, Mattar, and Maslow and as explicitly set forth in the rejections (see the underlined language), the couplings thereof are described as being flexible. Couplings formed of springs, elastomer materials, and rubber as described in these three patents are known as flexible materials (as described in the patents) that are most capable of returning to their original state after being deflected or deformed. Schub suggests as such by disclosing the "self-righting" function of the coupling by virtue of its flexibility at col. 2, lines 53-56. Note Figures 1-2 of Mattar

show the coupling 26 in a linear state (Fig. 2) as well as a deflected state (Fig. 1) and there is no evidence that the resilient coupling 26 would not, under any circumstances, return to the linear state (natural position) shown in Fig. 2 when the device is removed from the receptacle 10. From the disclosure of Maslow, it appears the flexible coupling 3 acts to hold the loops in their natural state when the handle is removed or when the loops are deflected.

As noted above, during patent examination, the pending claims must be interpreted as broadly as their terms reasonably allow. *In re Zletz*, supra. In determining patentability of claims, the PTO gives claim language its "broadest reasonable interpretation" consistent with the specification and claims. *In re Morris*, F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997) (citations omitted). The primary issue in the arguments is whether the whisk devices of Schub, Mattar, or Maslow each show a coupling that is capable of being resiliently flexible for allowing the whisk-head to deflect and spring back toward its natural position during use.

Contrary to Applicant's assertions is not necessary that Schub, Mattar, or Maslow explicitly disclose the deflection and spring-back function of the coupling. All that is required is evidence that the devices of Schub, Mattar, or Maslow are each capable of functioning in the claimed manner.

As discussed previously, there is indeed a reason to believe that the devices of Schub, Mattar, or Maslow are each capable of being used to achieve the acts Applicant has included in claim 15.' The examiner has established that the devices of Schub, Mattar, or Maslow meets the structural aspects recited in claim 15, namely a resiliently

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flexible coupling. As such, the Schub, Mattar, or Maslow devices are deemed most capable of allowing the whisk-head to deflect and spring back toward its natural position during use.

Accordingly, because the structure as described by the examiner above meets the elements of device recited in claim 15, it follows that the whisk devices of Schub, Mattar, or Maslow are quite capable of providing a coupling that is capable of being resiliently flexible for allowing the whisk-head to deflect and spring back toward its natural position during use.

Hence, contrary to applicant's position regarding burden of proof, the burden does shift to applicants to show that the devices of Schub, Mattar, or Maslow are not capable of performing the claimed function. See *In re Ludtke*, 441 F.2d 660, 664, 169 USPQ 563, 566-567 (CCPA 1971) (since alleged distinction between applicants' claims and reference is recited functional language, it is incumbent upon applicants to show that device disclosed by reference does not actually possess such characteristics).

In conclusion, the amendments made in the instant application are not deemed of a substantive nature to define over the prior art and thus the rejections are considered proper.

### **Conclusion**

17. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

The cited prior art discloses more whisks to support the examiner's position.

18. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. § 1.136(a).

A SHORTENED STATUTORY PERIOD FOR RESPONSE TO THIS FINAL ACTION IS SET TO EXPIRE THREE MONTHS FROM THE DATE OF THIS ACTION. IN THE EVENT A FIRST RESPONSE IS FILED WITHIN TWO MONTHS OF THE MAILING DATE OF THIS FINAL ACTION AND THE ADVISORY ACTION IS NOT MAILED UNTIL AFTER THE END OF THE THREE-MONTH SHORTENED STATUTORY PERIOD, THEN THE SHORTENED STATUTORY PERIOD WILL EXPIRE ON THE DATE THE ADVISORY ACTION IS MAILED, AND ANY EXTENSION FEE PURSUANT TO 37 C.F.R. § 1.136(a) WILL BE CALCULATED FROM THE MAILING DATE OF THE ADVISORY ACTION. IN NO EVENT WILL THE STATUTORY PERIOD FOR RESPONSE EXPIRE LATER THAN SIX MONTHS FROM THE DATE OF THIS FINAL ACTION. ANY RESPONSE FILED AFTER THE MAILING DATE OF THIS FINAL REJECTION WILL BE SUBJECT TO THE PROVISIONS OF MPEP 714.12 AND 714.13.

19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Charles E. Cooley whose telephone number is (571) 272-1139. The examiner can normally be reached on Mon-Fri. All official facsimiles should be transmitted to the centralized fax receiving number 571-273-8300.



Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read "Charles" followed by a stylized flourish.

Charles E. Cooley  
Primary Examiner  
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15 May 2006